

MAR 15 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

DIANNA LYNN NICE,

Petitioner - Appellant,

v.

L. KUYKENDALL, WARDEN,

Respondent - Appellee.

No. 05-55156

D.C. No. CV-04-02961-RSWL

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Submitted March 8, 2006^{**}

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

California state prisoner Dianna Lynn Nice appeals from the district court's judgment dismissing her 28 U.S.C. § 2254 habeas petition challenging her jury trial conviction for three counts of committing a lewd act on a child, and three

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

counts of procuring a child to engage in a lewd act. We have jurisdiction pursuant to 28 U.S.C. § 2253(a). We review de novo, *see Olvera v. Giurbino*, 371 F.3d 569, 572 (9th Cir. 2004), and we vacate and remand.

The district court erred when it dismissed Nice’s habeas petition as mixed without first offering her the choice of deleting her unexhausted claims so that she could proceed with the exhausted claims in federal court, or exhausting her unexhausted claims by returning to state court. *See Jefferson v. Budge*, 419 F.3d 1013, 1014, 1016 (9th Cir. 2005) (“[I]t is error for a district court to dismiss a mixed habeas petition without first offering the petitioner the options provided in *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L.Ed.2d 379 (1982).”); *see also Rhines v. Weber*, 544 U.S. 269, 125 S. Ct 1528, 1535 (2005) (“[I]f a petitioner presents a district court with a mixed petition . . . the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner’s right to habeas relief.”) (*citing Rose*, 455 U.S. at 520).¹ Accordingly, we vacate the district court’s order dismissing Nice’s habeas petition and remand so that Nice may be provided with an opportunity to exercise her options under

¹ Neither *Jefferson* nor *Rhines* limited its holding to pro se habeas petitioners.

Rose. See Vang v. Nevada, 329 F.3d 1069, 1076 (9th Cir. 2003). On remand, Nice may renew her request for a discretionary stay while she returns to state court to exhaust. *See Rhines*, 544 U.S. 269, 125 S. Ct. at 1535.

VACATED AND REMANDED.